IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE TWENTY SEVENTH DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HONOURABLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.14420 of 2004

Between:

1 Hotel Rajahamsa International, rep. by its Proprietor
Sri S.V. Subba Rao S/o Narasimham, Hindu, aged 65 years, Occ: Business R/o D.No. 27-43-8, Governorpet, Vijayawada.
2 Smt. Sikhakolli Baby Sarojini, W/o S.V. Subba Rao,
3 S.V.Narasimha Rao, S/o S.V. Subba Rao,
4 S. Durga Srinivasa Rao, S/o S.V. Subba Rao,
5 S. Siva Kumar, S/o S.V. Subba Rao,
All are R/o D.No. 11-25-253, Near Iron Center, Main Bazar, Vijayawada.

...PETITIONERS

AND

1. The Authorised Officer, Indian Overseas Bank,
23/67, Congress Office Road, Governorpet, Vijayawada- 520 002.

2. Indian Overseas Bank, 23/67, Congress Office Road,
Governorpet, Vijayawada - 520 002.

...RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a Writ of mandamus, or any other appropriate writ, order or direction, declaring the action of the respondents in seeking to sell the schedule property vide sale Notification dated 24.07.2004 issued by R-1 as being wholly illegal, untenable and unjustified and consequently set aside the same.

Counsel for the Petitioners: MR.V.HARI HARAN

Counsel for the Respondent:

The Court at the stage of admission made the following:

THE HONOURABLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.14420 OF 2004

ORDER:

M/s.Hotel Rajahamsa International is a proprietory concern which is running a hotel in the city of Vijayawada. The proprietor approached Indian Overseas Bank for a term loan and cash credit facility of Rs.40,00,000/- (Rupees forty lakh only). The same was sanctioned and is payable, as per the loan contract in instalments @ Rs.73,600/- (Rupees seventy three thousand six hundred only) per month with effect from 31.01.2001 up to 2009. The proprietor created an equitable mortgage in respect of building bearing No.27-43-8 along with land admeasuring 499.87 square yards at Governorpet, Vijayawada. Petitioners Nos.2 to 5 herein also mortgaged their property as guarantors. It is the case of the first petitioner that the instalments were paid up to December 2003, but in May 2004, the second respondent-Bank filed an application being O.A.No.98 of 2004 before the Debts Recovery Tribunal, Visakhapatnam (DRT) for recovery of the amount by sale of the properties mortgaged to the Bank. It appears, the Bank filed two Interlocutory Applications being I.A.Nos.229 and 233 of 2004 and obtained order of attachment of movable as well as immovable properties. The said O.A. is still pending.

The Bank initiated action under the provisions of Securitisation And Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002 (hereafter called 'the SARFAESI Act') calling upon the first petitioner to pay the entire amount of loan within a period of sixty (60) days. The first petitioner allegedly met the Bank officials and requested them not to initiate any action in view of the pendency of the proceedings before the DRT, Visakhapatnam. The first petitioner alleges that the Bank officials assured that no further action will be taken pursuant to notice issued under the SARFAESI Act. The second respondent-Bank, however, issued an auction notice, dated 24.07.2004, proposing to sell the property mortgaged by the proprietor of Hotel Rajahamsa International as well as the property belongs to petitioner Nos.2 to 5. The same was published in Eenadu Newspaper, assailing which the present Writ Petition is filed.

Sri V.Hari Haran, learned counsel for the petitioners submits that having invoked the recovery procedure as contemplated under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereafter called 'the Recovery Act'), it is not permissible for the second respondent-Bank to invoke the provisions of the SARFAESI Act. Learned counsel for the petitioners placed reliance on the Full Bench Judgment of this Court in ***K.Subba Reddy v. A.P.S.F.C. (FB)*** in support of the submission that it would be illegal for the second respondent-Bank to invoke the provisions of the SARFAESI Act having invoked the remedy before the DRT. No

other submission is raised in challenge to the impugned orders.

After due consideration of the submissions made before this Court, I am not able to accept the submission of the learned counsel for the petitioners. The SARFAESI Act was enacted with a view to enforce security interest of the lending banks. The vires of certain provisions of the SARFAESI Act were challenged before the Supreme Court on the ground that the provisions vesting the financial institutions to recover the loan amounts by bringing the mortgage properties to sale as vesting arbitrary powers without any guidance for their exercise. The provisions were upheld by the Supreme Court in judgment reported in ***Marida Chemicals Ltd. v. Union of India***. Dealing with Section 13(2) of the SARFAESI Act, the Honourable Supreme Court observed as under.

It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for along time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act.

Yet again, it was observed as under.

It is also true that till the stage of making of the demand and notice under Section 13 (2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated so as to demonstrate that the reply of the borrower to the notice under Section 13 (2) of the Act has been considered applying mind to it. The reasons, howsoever brief they may be, for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

Therefore, the requirement law is only to issue notice under Section 13(2) of the SARFAESI Act. Nowhere it bars the bank from proceeding under the SARFAESI Act even if there is OA pending before DRT. The Hon'ble Supreme Court, in paragraph 80 of the judgment, laid down as under.

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to

approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of depot of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

Section 35 of the SARFAESI Act lays down that provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, it is not possible to accept the submission that the provisions of Recovery Act control the provisions of Section 35 of the SARFAESI Act. Further Section 13(1) of the SARFAESI Act is to the effect that without intervention of the Court or Tribunal, the creditor may recover any security interest created in its favour in accordance with the provisions of SARFAESI Act. Even if the Bank has already availed remedy under Recovery Act, nothing prevents them for invoking the provisions of sub-sections (1) and (2) of Section 13 of the SARFAESI Act.

The judgment of the Full Bench in ***K.Subba Reddy v. A.P.S.F.C. (FB)*** (supra) has no application to the facts of this case. Sections 29 and 30 of the State Financial Corporations Act, 1951 ('the Act' for brevity) provided two different methods of recovery by the State Financial Corporation (SFC). Having regard to this, their Lordships of the Full Bench laid down that when once the SFC resorts to the procedure under Section 31 of the Act, and applies to the District Judge, SFC cannot proceed under Section 29 of the Act. The procedure contemplated under Section 13 of the SARFAESI Act does not contain two methods of recovery and therefore, the action of the second respondent is unexceptionable.

The Writ Petition, for the above observations, is dismissed.

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(V.V.S.RAO, J)

27th August 2004

NOTE: LR Copy be marked

B/O

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One Fair Copy to the Honourable Sri Justice V.V.S.Rao (For his Lordships kind perusal)

Copy To

1. The Authorised Officer, Indian Overseas Bank,
   23/67, Congress Office Road, Governorpet, Vijayawada- 520 002.

2. The Indian Overseas Bank, Congress Office Road, Governorpet, Vijayawada.

3. Eight LR copies.

4. The Under-Secretary, Union Bank of India, Ministry of Law, Justice and Company Affairs, New Delhi.

5. The Secretary, A.P.Advocates Association, Library, High Court Buildings,

Hyderabad (OUT).

6. Two CD copies.